

MANDATE

04-11430  
USDC MA  
Judge Lindsay

# United States Court of Appeals For the First Circuit

No. 05-2700

WILLIAM M. TYREE, JR.,

Plaintiff, Appellant,

v.

UNITED STATES ARMY, ET AL.,

Defendants, Appellees.

Before

Torruella, Circuit Judge,  
Selya, Senior Circuit Judge,  
and Lynch, Circuit Judge.

## JUDGMENT

Entered: April 11, 2007

Appellant William M. Tyree, Jr. appeals from the district court's judgment dismissing his complaint for failure to make timely service of process. We cannot review this claim of error, however, because the district court did not address evidence that appellant had submitted with his opposition to dismissal. Although we express no opinion on the matter, this evidence tended to show that appellant might have made adequate service. We nonetheless affirm the judgment of dismissal on another ground.

Appellant's theory of the case, as presented below, is based on the opinion of the Massachusetts Supreme Judicial Court (SJC) affirming his conviction on direct appeal. See Commonwealth v. Tyree, 439 N.E.2d 263 (Mass. 1982). In this regard, appellant points to the SJC's statement, made during its recitation of the facts, that his arrest had taken place on February 14, 1979. Id. at 270-71. Based on this statement, appellant assumes that the SJC was opining that probable cause for the arrest had not existed until the 14th. Because his arrest actually had occurred one day

earlier, on February 13, appellant concludes that probable cause was lacking.

Probable cause, or the lack thereof, never was an issue in appellant's direct appeal. Consequently, the SJC never made a ruling concerning when such cause did, or did not, exist. As a result, the SJC's statement of the date of appellant's arrest is just that -- a statement of historical fact -- and nothing more can be read into it. That the SJC may have misstated the date changes nothing; any error in stating the date was harmless.

Because it is apparent that appellant's whole theory is based on a misperception -- that the SJC made a finding about probable cause -- all of his claims against the defendants completely collapse. The judgment below is, therefore, summarily affirmed. See Local Rule 27.0(c). All pending motions are denied as moot.

By the Court:

Richard Cushing Donovan, Clerk.

Certified and Issued as Mandate  
under Fed. R. App. P. 41.

Richard Cushing Donovan, Clerk

  
Deputy Clerk

Date: 6/11/07

MARGARET CARTER

By: \_\_\_\_\_  
Chief Deputy Clerk.

[cc: William Tyree Jr. ,Michael Sady, AUSA, Mark Quinlivan, AUSA]